18-P-1349 Appeals Court

COMMONWEALTH vs. JOSEPH P. SCHMITT.

No. 18-P-1349.

Plymouth. February 3, 2020. - September 14, 2020.

Present: Green, C.J., Wolohojian, & Sullivan, JJ.

Sex Offender. Imprisonment, Credit for time served. Pretrial Detention. Practice, Criminal, Sentence.

Indictment found and returned in the Superior Court Department on January 31, 2017.

A motion to receive credit for time served awaiting trial, filed on June 13, 2018, was considered by Brian A. Davis, J.

Jason C. Howard for the defendant.
Carolyn A. Burbine, Assistant District Attorney, for the Commonwealth.

SULLIVAN, J. On April 10, 2018, the defendant, Joseph P. Schmitt, pleaded guilty to one count of possession of child pornography, see G. L. c. 272, § 29C, an offense that occurred while he was committed to the Massachusetts Treatment Center at Bridgewater (treatment center) as a sexually dangerous person

(SDP). See G. L. c. 123A, § 1 et seq. Schmitt appeals from the order denying his postsentencing motion to receive credit for the time he was held at the treatment center between the imposition of bail and his plea. See G. L. c. 127, § 129B; G. L. c. 279, § 33A. We conclude that he was entitled to credit for the time served in the treatment center after he was held on bail and prior to entry of his plea.

Background. At the time of his offense, Schmitt was civilly committed to the treatment center. While incarcerated, Schmitt received child pornography, apparently disguised as legal correspondence. A complaint issued in the District Court. Schmitt's bail was set at $50,000, on November 29, 2016. Schmitt did not post bail and remained at the treatment center. A judge of the District Court dismissed the charges against Schmitt after he was indicted on the same offense in the Superior Court on January 31, 2017.[1] On February 15, 2017, a judge of the Superior Court set his bail at $50,000. Again, Schmitt did not post bail, and remained at the treatment center.

[1] Schmitt was charged with eleven counts of possession of child pornography in the District Court, but nine of those counts were dismissed as having been entered in error on November 30, 2016. The remaining two charges were dismissed on March 2, 2017, after Schmitt was indicted in the Superior Court. Consequently, prior to his plea, there was no time after the District Court judge's initial bail determination, on November 29, 2016, when Schmitt was not held pursuant to a bail order in either the District Court or the Superior Court, or in both.

More than one year later, on April 10, 2018, he pleaded guilty and was sentenced to three years to three years and one day, with a recommendation that he serve his sentence at the treatment center.

After sentencing, Schmitt filed a motion to receive credit for the 497 days he spent in custody at the treatment center between the imposition of bail in the District Court on November 29, 2016, and his plea and sentencing in the Superior Court on April 10, 2018. The motion judge denied Schmitt's motion, reasoning that

> "[t]ime spent in custody on one matter generally cannot be credited against a sentence imposed in an unrelated matter. Commonwealth v. Milton, 427 Mass 18, 24 (1998). Although [the d]efendant's commitment was not on account of a crime, the concept is the same and the result, fairly, should be the same."

Schmitt timely appealed from the order denying his motion.

Discussion. As a general rule, "[c]riminal defendants have a right to have their sentences reduced by the amount of time they spend in custody awaiting trial, unless in imposing the sentence, the judge has already deducted such time or taken it into consideration in determining the sentence." Williams v. Superintendent, Mass. Treatment Ctr., 463 Mass. 627, 630–631 (2012), quoting Milton, 427 Mass. at 23–24. The language of the statute from which this rule is derived is mandatory, not discretionary; that is, the judge "shall order that the prisoner

be deemed to have served" that portion of a sentence spent "in confinement . . . awaiting and during trial." G. L. c. 279, § 33A.[2] However, we have been cautioned not to read "the [sentencing credit] statutes . . . literally." Manning v. Superintendent, Mass. Correctional Inst., Norfolk, 372 Mass. 387, 391 (1977).

The Commonwealth did not oppose the motion in the Superior Court and has not filed a brief on appeal, but there can be no real dispute that Schmitt was confined at the treatment center while awaiting trial.[3] Although the term "confinement" is not defined in the relevant statutes, see Commonwealth v. Morasse,

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[2] General Laws c. 279, § 33A, provides: "The court on imposing a sentence of commitment to a correctional institution of the commonwealth, a house of correction, or a jail, shall order that the prisoner be deemed to have served a portion of said sentence, such portion to be the number of days spent by the prisoner in confinement prior to such sentence awaiting and during trial."

[3] This case was entered in this court on September 27, 2018, and Schmitt's brief was filed on February 27, 2019. The Commonwealth sought and received two extensions of time through September 25, 2019, to file its brief. When no brief was filed, the case was scheduled for argument. The Commonwealth was ordered to appear and to answer any questions posed by the panel. In a postargument letter, the Commonwealth informed us that Schmitt's criminal sentence terminated on May 7, 2020. If intended as a suggestion of mootness, we decline the invitation. We reach the merits of this issue because it is "capable of repetition, yet evading review" (citation omitted), Commonwealth v. McCulloch, 450 Mass. 483, 486 (2008), and is an issue of importance to the orderly administration of justice. See Department of Revenue Child Support Enforcement v. Grullon, 485 Mass. 129, 130 (2020), citing Commonwealth v. Yameen, 401 Mass. 331, 333 (1987), cert. denied, 486 U.S. 1008 (1988).

446 Mass. 113, 116 (2006), we have previously treated involuntary commitment to a secure facility as confinement for purposes of G. L. c. 279, § 33A, and its companion statute, G. L. c. 127, § 129B.[4] For example, we have treated pretrial confinement of a prisoner in a mental health facility as confinement for purposes of jail credit. See Morasse, supra at 120 ("Although a State hospital is not technically a 'prison' or 'jail,' the nature of such a commitment is the functional equivalent of being incarcerated, and sentencing credit for such time is consistent with the Legislature's intent"). As the Supreme Judicial Court explained in Stearns, petitioner, 343 Mass. 53, 56 (1961), "We see no reason why the statute should not apply as well to the time before trial that an insane prisoner held on criminal process spends in a mental hospital pending his restoration to sanity. He is in custody and is awaiting trial. If he were committed to the hospital after he

[4] General Laws c. 127, § 129B, requires time spent in pretrial custody in all correctional institutions, houses of correction, and jails to be credited in a like manner. "The sentence of any prisoner in any correctional institution of the commonwealth or in any house of correction or jail, who was held in custody awaiting trial shall be reduced by the number of days spent by him in confinement prior to such sentence and while awaiting trial, unless the court in imposing such sentence had already deducted therefrom the time during which such prisoner had been confined while awaiting trial." Id.

had started to serve his sentence his time there spent would be credited on his sentence."[5]

Likewise, an SDP who is confined to the treatment center on both a civil SDP commitment and for the purposes of any criminal sentence later imposed on those charges is confined for purposes of his criminal sentence. Were he to be released from civil commitment, he would remain confined on the criminal matter. This fundamental reality was recognized implicitly in Commonwealth v. Godfroy, 420 Mass. 561 (1995), a case not decided under the sentencing credit statutes, where the Supreme Judicial Court remanded the matter for resentencing and credited the defendant for his time served, postconviction, as an SDP in the treatment center and pursuant to his underlying criminal convictions. See id. at 567-568.

As with any rule, however, there are exceptions. One, as the motion judge recognized, is that "time spent in custody awaiting trial for one crime generally may not be credited

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[5] In Stearns, petitioner, 343 Mass. at 54, the defendant had been arrested and charged with assault with intent to murder, and assault by means of a dangerous weapon. After his arrest, but before his trial, he spent approximately two months in jail, and then spent approximately four additional years "committed as insane" to Bridgewater State Hospital (hospital). Id. After being released from the hospital to the prison system, he was tried and convicted. See id. at 54-55. The Supreme Judicial Court credited him for time spent both in jail and at the hospital because he was at all times in custody and was at all times "awaiting trial." Id. at 56.

against a sentence for an unrelated crime." Milton, 427 Mass. at 24. This exception is drawn from the recognition that "the fair and untortured reading of the statute [is] that a prisoner is to receive credit for all jail time -- neither more nor less -- served before sentencing which relates to the criminal episode for which the prisoner is sentenced." Commonwealth v. Carter, 10 Mass. App. Ct. 618, 620 (1980). Cf. Needel, petitioner, 344 Mass. 260, 262 (1962). This exception is intended to forestall undesirable and unintended sentencing consequences, such as creating a "line of credit for future crimes," or obtaining double credit for two offenses in a manner that frustrates one or both sentencing schemes. Milton, supra, quoting Manning, 372 Mass. at 395. See Williams, 463 Mass. at 631.

The concerns underlying Milton are not present here. First, an SDP is not serving a separate committed sentence for a criminal offense. By definition, an SDP has already fully served his or her full criminal sentence. Second, like the prisoner committed to a mental health facility awaiting trial, an SDP has been civilly committed.[6] The purpose of the

[6] We recognize the "quasi civil, quasi criminal nature of sexual dangerousness proceedings." R.B., petitioner, 479 Mass. 712, 716 (2018). We made this observation, however, in the context of affording greater safeguards to SDPs in connection with the loss of liberty, while simultaneously underscoring that a "G. L. c. 123A proceeding is neither criminal nor penal in

commitment is not punitive. Rather, it "is a comprehensive legislative program designed to identify and treat sexually dangerous persons . . . . Commitment to the treatment center and the treatment an SDP receives there is intended to provide the SDP with an opportunity to overcome his general lack of power to control his sexual impulses . . . . It does not serve as an additional punishment or deterrent measure" (quotations and citations omitted). Hill, petitioner, 422 Mass. 147, 153-154, cert. denied, 519 U.S. 867 (1996). A committed SDP cannot credit time against future offenses because a committed SDP is not being held on an offense. Third, the SDP's civil commitment is indefinite. There is no criminal sentence as to which jail credits apply. An annual review may in fact result in release if the petitioner is no longer an SDP. See Chapman, petitioner, 482 Mass. 293, 294 (2019). In the context of confinement as an SDP, there is no risk of double counting. If the time is not credited to the criminal offense, then it is credited to nothing.

"The key consideration in [the statutory] analysis is fairness to the defendant." Commonwealth v. Pearson, 95 Mass. App. Ct. 724, 727 (2019). "Both the Massachusetts court and [L]egislature have made considerable effort to differentiate

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nature." Id., quoting Commonwealth v. Curran, 478 Mass. 630, 637 (2018) (Kafker, J., concurring).

between the treatment of the sexually dangerous, on the one hand, and the penalizing of criminals on the other" (citation omitted). Commonwealth v. Barboza, 387 Mass. 105, 112, cert. denied, 459 U.S. 1020 (1982). If a pretrial detainee has been determined "no longer" to be an SDP, he or she would be free to leave confinement were it not for the pending criminal offense. G. L. c. 123A, § 9. See Chapman, petitioner, 482 Mass. at 294. Failing to credit a criminal defendant for time served awaiting trial while held at the treatment center as an SDP would frustrate the intent of the Legislature, see Stearns, petitioner, 343 Mass. at 55-56, and risks raising "difficult questions of due process and equal protection" by converting a civil SDP commitment into criminal punishment. Commonwealth v. McLaughlin, 431 Mass. 506, 515 (2000) (vacating stay of execution of sentence pending completion of six-month term of civil mental health commitment). See R.B., petitioner, 479 Mass. 712, 716 n.4 (2018). See also Commonwealth v. Bruno, 432 Mass. 489, 500 (2000) (rejecting ex post facto challenge on grounds that SDP statute was "nonpunitive" and "civil" [citation omitted]); Hill, petitioner, 422 Mass. at 154 (rejecting double jeopardy challenge on grounds, among others, that SDPs are civilly committed). See generally Commonwealth v. Curran, 478 Mass. 630, 637 (2018) (Kafker, J., concurring) ("We have repeatedly emphasized the fundamental difference between

criminal punishment and civil commitment of a sexually dangerous person").

Conclusion. The order denying Schmitt's motion to receive credit for time served is reversed, and the case is remanded for entry of a new order crediting Schmitt for time served at the treatment center between the imposition of bail in the District Court and the entry of his plea, and for any further proceedings consistent with this opinion.

So ordered.